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## **HRC Response to the Office of the Prosecutor's Draft Policy Paper on Case Selection and Prioritisation**

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April 2016

# **HRC Response to the Office of the Prosecutor's Draft Policy Paper on Case Selection and Prioritisation**



Human  
Rights  
Centre



1. We welcome the publication and consultation with civil society and interested parties on the development of the Office of the Prosecutor's (OTP) Draft Policy Paper on Case Selection and Prioritisation. This submission on behalf of the Human Rights Centre at Queen's University Belfast seeks to highlight a better appreciation of victims' interests in determining key junctures in the investigation of case selection and prioritisation.<sup>1</sup> In particular this submission distinguishes victims' interests in decision-making, a more victim-orientated assessment of admissibility, the valuable role they can play in the investigation, and a right to review decisions not to prosecute. In light of these issues the brief provides some recommendations.

### **Interests of Justice and Victims' Interests**

2. Victims' interests are a key part in determining justice. Their interests do not trump other interests or rights, but as key stakeholders and those most affected by international crimes they can provide keen insights in how to address such atrocities in a meaningful way.<sup>2</sup> Assuming what victims' interests are without engaging directly with them can lead to decisions on crimes which affect them appearing patronising and disenfranchising, reinforcing the marginalisation and denial of dignity that mark the international crimes from which they suffered.
3. The Office of the Prosecutor has often spoke of the centrality of victims to the work of the ICC,<sup>3</sup> stating that it is the work of the Prosecutor to 'investigate and prosecute those most responsible for the world's gravest crimes, where no-one else is doing justice for the victims.'<sup>4</sup> We would argue that in order to ensure that the Office is indeed doing justice for victims, it is necessary to meaningfully engage with victim populations, in order to ascertain their legitimate interests and wishes. While respecting the need of the Office to ensure its own impartiality and independence, it is submitted that such engagement can lead to decisions on case selection and prioritisation which better reflect the needs of those in whose name the Office purports to work. The alternative, being the assumption that victims' wishes will coincide with the approach of the Prosecution, risks the Office attracting (further) criticism that its victim-centric language constitutes a legitimising tool rather than a genuine engagement with victimised individuals.<sup>5</sup>

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<sup>1</sup> This submission is written by Dr Luke Moffett and Dr Rachel Killeen. The views expressed in this work are

<sup>2</sup> See L. Moffett, *Justice for Victims before the International Criminal Court*, (Routledge 2014), p37.

<sup>3</sup> L. Moreno-Ocampo, Prosecutor of the ICC, Seventh Diplomatic Briefing, Brussels, 29 June 2006, at 8, available at [www.icc-cpi.int/NR/rdonlyres/BD7174D4-6BBF-4A26-BB06-9509E195C29E/278529/DB7StEnglish.pdf](http://www.icc-cpi.int/NR/rdonlyres/BD7174D4-6BBF-4A26-BB06-9509E195C29E/278529/DB7StEnglish.pdf) ("At every stage of the judicial process, the Office [of the Prosecutor] will consult with the relevant victims and take their interests into account."); L. Moreno-Ocampo, Prosecutor of the ICC, 18th Diplomatic Briefing, The Hague, 26 April 2010, at 2, available at [www.icc-cpi.int/NR/rdonlyres/CA355D60-EC32-467A-8CA6-F7FA93D86C0B/281862/100426LMOspeechdiplomaticbriefing\\_final.pdf](http://www.icc-cpi.int/NR/rdonlyres/CA355D60-EC32-467A-8CA6-F7FA93D86C0B/281862/100426LMOspeechdiplomaticbriefing_final.pdf)

<sup>4</sup> ICC Press Briefing, Nairobi, Statement by the Prosecutor of the International Criminal Court Mrs. Fatou Bensouda, 22 October 2012, at 3.

<sup>5</sup> Laurel Fletcher, *Refracted Justice: The Imagined Victim and the International Criminal Court*, in C De Vos, S Kendall and C Stahn (eds.), *Contested Justice: the Politics and Practice of International Criminal Court*

Moreover, the assumption of victims' interests without engagement may be interpreted as condescending or insensitive by victim groups, thus in fact risking the legitimacy of the Court in the eyes of those groups.<sup>6</sup> A desire to be consulted and informed has frequently been voiced by victimised communities,<sup>7</sup> and this should extend to the process of case selection and prioritisation. This approach is consistent with the OTP Strategic Plan 2016-2018 recognising that it cannot meet all victims' expectations, but

*will continue to take a victim-responsive approach throughout all aspects of its work, by (1) taking into accounts their views; (2) communicating, where possible together with the Registry, with the affected communities about the role of the Court and the Office's decisions, and (3) ensuring that their well-being is duly taken care of when they interact with the Office.*<sup>8</sup>

4. We agree with the Prosecutor's stance that decisions not to prosecute in the interests of justice should only be resorted to as a course of last resort. Beyond the purpose of the ICC to end impunity, and while there are understandable reasons for amnesties for certain non-international crimes or conditional ones for non-senior commanders, blanket amnesties are problematic for ensuring victims have access to justice.<sup>9</sup> This is apparent in the Ugandan situation, where the Amnesty Act 2000 was passed with the intention of bring home the many adults and children who had been abducted by groups like the Lord's Resistance Army, but also included senior commanders, yet has not seen a corresponding transitional justice roadmap for victims emerge. Such complex domestic legal terrain needs to be carefully navigated to tackle impunity and ensure justice for victims, the role of the OTP in ensuring international crimes are investigation and prosecuted is vital in meeting these goals.
5. It is also acknowledged that there are possible scenarios where accountability can be more widely achieved through a comprehensive approach that includes reparations, truth commission, trials, guarantees of non-recurrence and reduced sentences. What is important here is to engage victims in the discussion, so that if a decision is to be made on the interests of justice not to prosecute, victims are both *consulted* beforehand and then *informed* of the decision. In this way, victims are able to have input into the decision making process and exercise voice before a final decision is

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*Interventions* (Cambridge University Press, 2015); S. Kendall and S. Nouwen, Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood, 76 *Law and Contemporary Problems* (2013) 235; and K. McEvoy and K. McConnachie, Victims and Transitional Justice: Voice, Agency and Blame, 22 *Social and Legal Studies* (2013) 489.

<sup>6</sup> McEvoy and McConnachie, *ibid*.

<sup>7</sup> R. Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia', *International Criminal Law Review* (2016) 16, 1-38; S. Cody Smith, The Victims' Court? A study of 622 Victim Participants at the ICC, UC Berkeley School of Law Human Rights Centre (2015).

<sup>8</sup> OTP Strategic plan 2016 - 2018, 6 July 2015, para.35.

<sup>9</sup> The Belfast Guidelines on Amnesty and Accountability, Transitional Justice Institute 2013. Available at [https://www.ulster.ac.uk/data/assets/pdf\\_file/0005/57839/TheBelfastGuidelinesFINAL\\_000.pdf](https://www.ulster.ac.uk/data/assets/pdf_file/0005/57839/TheBelfastGuidelinesFINAL_000.pdf)

made, which in the absence of domestic trials may extinguish their only avenue for criminal accountability. One significant challenge in dealing with the complex and vastness of situations featuring numerous international crimes, is finding which victims and victim groups can be engaged with and informed. This is not for the OTP to resolve by itself, but should also involve the Registry and civil society. Greater engagement with the Victim Participation and Reparations Section and Public Information and Documentation Section of the Registry is needed to discern a plurality of victims' voices, and use of technology should be encouraged to allow for the greatest collection of data and communication with victims, such as SMS or encrypted online messaging. We believe that a greater account of victims' interests can be included in the selection and prioritisation of cases and charges.

### **Selection of Cases and Charges**

6. We applaud the OTP's discussion of complementarity within its draft paper, and its intention to continue working with national authorities. We encourage an approach which balances legal pragmatism with recognition of the fact that victims may have few avenues of recourse, and of the importance of countering impunity. The Office has previously stated that it will 'investigate and prosecute those who bear the greatest responsibility for the most serious crimes ... [encompassing] those situated at the highest echelons of responsibility, including those who ordered, financed, or otherwise organized the alleged crimes.'<sup>10</sup> In order to ensure a level of predictability and legal certainty, the approach towards who are considered to have greatest responsibility should be principled and consistent, and should consider the gravity of the crimes and the level of responsibility for those crimes both within the specific historical context and in comparison to other cases.<sup>11</sup>
7. Victims' interests and expectation of justice at the ICC are likely to always outreach the Court's capacity. Such a situation would appear to enhance the imperative of ensuring representative prosecutions and a wide selection of charges to capture the criminality of the perpetrator. However, as the case against Slobodan Milošević demonstrates, this is not without risks. In that case, the prosecution believed they had a 'duty to the victims' to ensure that the crimes they suffered are representatively recognised by the charges brought against the defendant.<sup>12</sup> That the prosecution tried to ensure a representative picture of victimisation caused by Milošević was evidenced in the charges, which included victims in Bosnia, Croatia, and Kosovo and were described as so-called 'just representation'. Nonetheless, Milošević died after four years of trial

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<sup>10</sup> OTP Prosecutorial Strategy 2009-2012, 1 February 2010, para.19.

<sup>11</sup> R. DeFalco, 'Cases 003 and 004 at the Khmer Rouge Tribunal: The Definition of "Most Responsible" Individuals According to International Criminal Law' *Genocide Studies and Prevention: An International Journal* (2013) 8, 45-65.

<sup>12</sup> *Prosecutor v Milošević*, 29 November 2005, transcript p.46654.

and without a judgment, leaving victims with little sense of justice, but much frustration.<sup>13</sup> Fears that a similar fate may befall the victims of the Khmer Rouge has led to the ECCC to split its second case into a series of sub-trials, yet this decision has also been followed by heated disputes with regards to which crimes to prioritize, and how to make the sub-trials representative of the experiences of victims.<sup>14</sup>

8. Contrary to the wish for 'just representation', it may well be in victims' interests that charges are narrow enough to allow for speedy trials, as their may be a legitimate fear that justice delayed will lead to justice denied.<sup>15</sup> Yet there may also be a desire to see their harms reflected in the indictment. Indeed, too great a focus on expediency has been criticised as occasionally opposing to interests of victims, for example when it is used to justify the acceptance of plea bargains,<sup>16</sup> or the pursuit of selective prosecutions that fail to address all alleged crimes.<sup>17</sup> This argument suggests that an over-prizing of expediency sacrifices the full pursuit of accountability and truth for victims.<sup>18</sup> Rather than offer a solution to what is clearly a complex problem, we would again assert the need for consultation and communication with victim groups. Such a process could assist the Prosecutor in first, ascertaining the views of those reflected, and second, explaining the prioritisation strategy to those groups. Explanation may cushion the impact of decisions perceived as being against their wishes. It may also be useful to further develop guidelines on how the Office will seek to balance these competing interests.
9. It is not necessary here to reiterate the criticisms which have been voiced with regards to the failure of international criminal institutions to fully prosecute SGBV crimes,<sup>19</sup> but we would like

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<sup>13</sup> S. Darehshori, 'Weighing the Evidence: Lessons from the Slobodan Milošević Trial' *Human Rights Watch*, Volume 18, No. 10(D) (December 2006).

<sup>14</sup> Case 002, Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/1, 002/19-09-2007-ECCC/TC, 27 January 2012; Case 002, Lead Co-lawyers and Civil Party Lawyers Request for Reconsideration of the Terms of the Severance Order, 002/19-09-2007-ECCC/TC, 18 October 2011; Case 002, IENG Sary's Response to the Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01, 002/19-09-2007-ECCC/TC, 3 February 2012; Case 002, Response to Co-Prosecutors' Request for Reconsideration of the Severance Order, 002/19-09-2007-ECCC/TC, 11 October 2011.

<sup>15</sup> R. Killean, Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia', *International Criminal Law Review* (2016) 16, 1-38; R. Zacklin, 'The Failings of Ad Hoc Tribunals' 2 *Journal of International Criminal Justice* (2004) 541.

<sup>16</sup> R.E. Rauxloh, Plea Bargaining in International Criminal Justice: Can the international Criminal Court Afford to Avoid Trials, 1(2) *Journal of criminal Justice Research* (2011) 1; and L. Burens, Plea Bargaining in International Criminal Tribunals: The End of Truth-Seeking in International Courts? *Zeitschrift für Internationale Strafrechtsdogmatik* (2013).

<sup>17</sup> S. M. Pritchett, Entrenched Hegemony, Efficient Procedure, or Selective Justice?: An Inquiry into Charges for Gender-Based Violence at the International Criminal Court, 17 *Transnational Law and Contemporary Problems* (2008) 265.

<sup>18</sup> A. Whiting, 'In International Criminal Prosecutions, Justice Delayed Can be Justice Delivered' *Harvard International Law Journal* (2009) 50(2), 323-364.

<sup>19</sup> C. Chinkin, S. Wright and H. Charlesworth, 'Feminist Approaches to International Law: Reflections from Another Century', in D. Buss and A. Manji (eds) *International Law: Modern Feminist Approaches* (Hart Publishing, 2005) 17-46; F. Ní Aoláin, 'Exploring a Feminist Theory of Harm in the Context of Conflicted and

to laud the OTP for launching its protocol on this issue and for implementing it in the additional charges against Dominic Ongwen. Too often, SGBV crimes are left unprosecuted due to arguments of ‘legal pragmatism’, leaving victims without redress.<sup>20</sup> We hope that the OTP’s work on this issue will continue to see considerably improvements in this regard and merely seek to re-assert the importance in battling impunity for SGBV crimes.

10. In the same vein the OTP should seek to tackle root crimes, ensuring such crimes are charged more often. We would submit a crime which is perhaps overlooked or is difficult to prosecute is the crime of forced displacement. Increasingly state forces and non-state armed groups are displacing civilian populations for criminal, economic or political gains, but this is often only charged as symptoms of murder, rape and pillage crimes. Charging such crimes in this way neglects to consider the policy or cause of the violence in forced displacement, whether as a war crime of unlawful transfer of civilians or a crime against humanity as forced transfer of a population.<sup>21</sup> Root crimes such as forced displacement reflect a worrying trend in armed conflict and mass violence whereby civilians are the target of inhumane and cruel treatment, advanced for a range of political, economic and social objectives. By prosecuting such crimes as root crimes it can go to the essence of the motivation of such crimes, better tackle impunity and their future recurrence. We do realise that this is dependent on evidence, as the Callixte Mbarushimana case demonstrates, but from a victim-orientated perspective prosecuting root crimes better acknowledges their suffering and the wider policy goals behind such atrocities.

### **Prioritisation of Cases and Charges**

11. We find it helpful that the OTP has spelt out the factors in considering how to prioritise cases. As the situation in Cote d’Ivoire demonstrates, sequential investigations and timing can be difficult to manage with state cooperation and ensuring all responsible actors are held to account. This may lead to perceptions of the ICC as reinforcing ‘victors justice’ or reinforcing the current government’s legitimacy.<sup>22</sup> While recognising the limited resources of the OTP, efforts should be made to ensure that balanced investigations of all responsible actors proceed at the same, rather than one side before the other. This may be difficult in practice, as we understand the time necessary to create a full picture of crimes; their organisation and perpetrators must be mapped

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Post- Conflict Societies’, 35 *Queen’s Law Journal* (2009) 219; and S. SáCouto ‘Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?’ 18 *Michigan Journal of Gender and the Law* (2012) 297.

<sup>20</sup> T. De Langis, *Pragmatism must yield to compassion*, *Phnom Penh Post*, 19 June 2012; C Ginn, Ensuring the Effective Prosecution of Sexually Violent Crimes in the Bosnian War Crimes Chamber: Applying Lessons from the ICTY, 27 *Emory International Law Review* (2013) 565 at 585-587.

<sup>21</sup> See L. Moffett, ‘Accountability for forced displacement in Democratic Republic of Congo and Uganda before the International Criminal Court’, *African Journal of International Criminal Justice*, (forthcoming) 2016.

<sup>22</sup> Turning Rhetoric into Reality: Accountability for Serious International Crimes in Côte d’Ivoire, Human Rights Watch, 2013, p35–37.

out fully and investigated to establish a case. Yet given the length of trials at the ICC, currently averaging 6-8 years between arrest and conviction, we believe there is space to incorporate this balance into OTP's work

## Admissibility

12. There is no reference to victims' interests in determining unwillingness or inability in admissibility of cases before the Court, and there has been no admissibility decision based on victims' interests. We believe that ending impunity goes hand-in-hand with justice for victims and that assessment of domestic proceedings should in part take into account access to justice for victims.<sup>23</sup> Although admissibility is for the Chambers to decide, the OTP plays an important part in determining which cases to prosecute based on considerations of admissibility under Article 17. The Chambers and the OTP should consider victims' interests in such decisions, as the Rome Statute provides victims the opportunity to present their observations.<sup>24</sup>
13. In the Ugandan situation some victims' interests were represented before the Court that noted the lack of access to justice for victims, non-existent witness protection and the Ugandan government's lack of sincerity in remedying victims' suffering.<sup>25</sup> However the Court dismissed these as irrelevant.<sup>26</sup> We would dispute the Court's finding in that case. Victims can provide keen insights and a bottom-up perspective of the local reality of the government's willingness and ability to conduct investigations and prosecutions. In the case of Simone Gbagbo, Pre-Trial Chamber I found that victim initiatives to bring perpetrators to justice through private prosecutions or *partie civile* do not amount to willingness or ability on behalf of the national government.<sup>27</sup> Similarly in the Libyan situation the OPCV highlighted that victims did not have access to criminal proceedings, including participation, protection and reparations, nor do they trust the Libyan government to provide impartial proceedings.<sup>28</sup> Moreover, beyond victims'

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<sup>23</sup> See *Prosecutor v Katanga*, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Katanga (ICC-01/04-01/07-1497), Appeals Chamber, 25 September 2009, para.79.

<sup>24</sup> Article 19(3). See L. Moffett, 'Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague', *Journal of International Criminal Justice*, (2015) 13(2): 281-311.

<sup>25</sup> *Prosecutor v Kony and others*, Amicus curiae submitted pursuant to the Pre-Trial Chamber II 'Decision on Application for Leave to Submit Observations under Rule 103' dated 5 November 2008, ICC-02/04-01/05-353, 18 November 2008; and *Prosecutor v Kony and others*, Observations on Behalf of Victims Pursuant to Art. 19(1) of the Rome Statute with 55 Public Annexes and 45 Redacted Annexes, ICC-02/04-01/05-349, Office of Public Counsel for Victims, 2 January 2009.

<sup>26</sup> *Prosecutor v Kony and others*, Decision on the Admissibility of the Case under Art. 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, para.47-51.

<sup>27</sup> *Prosecutor v Simone Gbagbo*, Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, ICC-02/11-01/12-47-Red, 11 December 2014, para.64 and 72.

<sup>28</sup> *Prosecutor v Al-Islam Gaddafi*, Observations on Behalf of Victims on the Government of Libya's Application Pursuant to Art 19 of the Rome Statute, ICC-01/11-01/11-166-Red-Corr, 5 June 2012, para.52-54. Similar concerns were expressed in Cote d'Ivoire, see *Le Procureur c Simone Gbagbo*, Observations des victimes sur la "Requête de la République de Côte d'Ivoire sur la recevabilité de l'affaire le Procureur c. Simone Gbagbo et



access to justice in terms of participation, witness and victim protection is a key indicator of a state's ability to investigate and prosecute international crimes by ensuring that key testimony is before domestic courts.<sup>29</sup> Some States have already included victim participation and protection into their domestic ratification legislation of the Rome Statute for any domestic international crimes trials.<sup>30</sup>

14. Accordingly, victim protection and participation should be considered as a factor in determining admissibility decisions. However, this should be tempered with the fact that the ICC is not a human rights court with the power to assess fair trial rights of victims in domestic processes. Moreover, states should have some margin of appreciation in the aftermath of international crimes.<sup>31</sup> There will be no one size fits all approach in developing victim participation or protection measures within a country, though there a number of minimum standards that could be achieved that reflect best practice and emerging norms: information on criminal proceedings; access to legal aid for representation; protection before, during and after trial from reprisals and intimidations; special measures for vulnerable witnesses; a dedicated witness protection agency; and special training for staff to deal with witnesses and victims.<sup>32</sup> These basic standards are best captured by the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which was the basis of victim provisions in the Rome Statute:

The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

- (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;
- (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
- (c) Providing proper assistance to victims throughout the legal process;
- (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses

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demande de sursis à exécution en vertu des articles 17, 19 et 95 du Statut de Rome”, ICC-02/11-01/12-40-Red, 9 April 2014.

<sup>29</sup> *Prosecutor v Al-Senussi*, Decision on the Admissibility of the Case Against Abdullah Al-Senussi, ICC-01/11-01/11-466-Red, 11 October 2013, para.283-301.

<sup>30</sup> In Ireland Section 14, ICC Act 2006; and Articles 13 and 14 Uruguayan Law on Cooperation with the ICC 2006.

<sup>31</sup> Frédéric Mégret and Marika Giles Samson, Holding the Line on Complementarity in Libya The Case for Tolerating Flawed Domestic Trials, *Journal of International Criminal Justice* 13(1) (2013) 571-589.

<sup>32</sup> UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147, 16 December 2005, para.5; Council of Europe Guidelines on Eradicating impunity for serious human rights violations, 2011, Principle VII; and Joint Staff Working Document on Advancing the Principle of Complementarity, European Commission, 31 January 2013, p24.

on their behalf, from intimidation and retaliation;  
(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.<sup>33</sup>

Together these provisions on victim participation and protection can reflect to what extent victims have access to justice through local courts and whether domestic investigations and prosecutions are being frustrated by political interference, delays or intimidation.

## **Victim Participation in Investigation**

15. The investigation and the selection of cases and charges represents a critical stage in the ICC that will demarcate which perpetrators and crimes will be prosecuted and potentially convicted. For victims these decisions can be most acute where domestic processes are unable or unwilling to investigate or prosecute international crimes. In such a case, the ICC presents their only resort for justice, with the OTP's selection of cases and charges defining which victims can participate and claim reparations. Of course we do not reduce victims' interests to claiming reparations, although it can be the most tangible outcome for them from the Court. Indeed, their participation can also ensure that those responsible are held to account for the harm they have caused, and that a fuller truth emerges, vindicating the victims' harm and the perpetrator's wrongful actions. While we appreciate the OTP can only ever investigate and prosecute a fraction of international crimes, we believe that greater transparency and legitimacy can be brought to this decision making process through victim participation in the investigation.

16. There is growing recognition of the importance of victim participation in the investigation of crimes, in particular in the context of gross violations of human rights and international crimes. The European and Inter-American Courts of Human Rights has found that victim participation in the investigation helps to ensure public transparency and effectiveness in finding the truth and identifying those responsible, given that victims are both key witnesses and stakeholders.<sup>34</sup> For victims, their involvement in the investigation helps to safeguard their interests. The Inter-American Court of Human Rights has determined that during an investigation, victims should have 'substantial possibilities of being heard and acting in the respective proceedings, both in order to clarify the facts and punish those responsible, and to seek due reparation.'<sup>35</sup> The regional human rights courts have acknowledged victims are entitled to have access to the investigation and case file, including witness statements, and to present their interests, as well as to have 'full

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<sup>33</sup> UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34 29 November 1985, para.6.

<sup>34</sup> *Kaya v Turkey*, Application no. 22492/93, (ECtHR, 28 March 2000), paras.121–126; *McKerr v United Kingdom*, Application no. 28883/95, (ECtHR, 4 May 2001), para.115; *Mapiripán Massacre v Colombia*, Judgment on Merits, Reparations, and Costs, (IACtHR, 15 September 2005), para.116 and 119; *Al-Skeini v United Kingdom*, App. no. 55721/07 (ECtHR, 7 July 2011), para.167.

<sup>35</sup> *Villagrán Morales et al. Case (The "Street Children" Case) v Guatemala*, Reparations, Series C No 63 (IACtHR, 19 November 1999), para.227.

access and the capacity to take part in all the stages of the investigation'.<sup>36</sup> It does not mean that every request by a victim has to be satisfied, for instance all sensitive information does not have to be disclosed to victims during the investigation, rather the information provided to them should be sufficient for them to effectively participate in proceedings that affect their interests.<sup>37</sup>

17. Including victims' interests at an early stage may help to minimise inappropriately narrow selection, characterisation or dropping of charges. This may avoid lengthy challenges in later proceedings, such as through Regulation 55 recharacterisations. It may also ensure that grave crimes are not overlooked. The example of the ECCC demonstrates the importance of victim participation in this regard. The inclusion of forced marriage in that Court's second case is entirely due to the efforts of the participating civil parties and their lawyers who requested investigations into the issue.<sup>38</sup> This inclusion of forced marriage charges was applauded at the time as a 'significant positive development for international criminal law',<sup>39</sup> and highlighted the potential of victim participation to contribute to the Court's narrative; due to the work of the civil parties and their lawyers, the experiences of many victims would be more accurately reflected in the indictment against the most senior members of the Khmer Rouge. While the ECCC continues to face criticism for its failure to adequately prosecute SGBV, in April 2014 the International Co-Prosecutor published a press release announcing the filing of a Submission for Case 004 'requesting the investigation of sexual or gender-based violence.'<sup>40</sup> The International Co-Prosecutor explained that this submission was based on the evidence that had become available both from witnesses during Case 004 investigations and also on the evidence of civil parties during Case 002.<sup>41</sup> This was followed by another press release in November 2014 in relation to a Case 003, requesting investigations into forced marriage and coerced sexual relations.<sup>42</sup> These incidences again demonstrate the value of civil party participation in increasing the visibility of victims of sexual violence, and in assisting the Prosecution team in reflecting to true extent of criminal activity within its work.

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<sup>36</sup> *Oğur v Turkey*, App No. 21594/93 (ECtHR, 20 May 1999), para 92; *Güleç v Turkey*, App No. 21593/93 (ECtHR, 27 July 1998), para 82; and *McKerr v the United Kingdom*, App No. 28883/95 (ECtHR, 4 May 2001), para 148; *Gomes-Lund et al. (Guerrilha do Araguaia) v Brazil*, Judgment on Merits, Reparations and Costs, Series C No 219, (IACtHR, 24 November 2010), para.257.

<sup>37</sup> *Ramsahai and Others v The Netherlands*, Application no. 52391/99, (ECtHR, 15 May 2007), para.347-349.

<sup>38</sup> Supplementary Submission, Case 002, ECCC Office of the Co-Prosecutors, 30 April 2009; Order on Request for Investigative Action Concerning Forced Marriage and Forced Sexual Relations, Case 002, ECCC Office of the Co-Investigating Judges, 18 December 2009.

<sup>39</sup> V. Oosterveld, 'Atrocity Crimes Litigation Year-in-Review (2010) A Gender Perspective', 9 *Northwestern Journal of International Human Rights* (2011) 325 at 354.

<sup>40</sup> ECCC Press Release. International Co-Prosecutor requests investigation of alleged sexual and gender-based violence in Case 004, 24 April 2014.

<sup>41</sup> Ibid.

<sup>42</sup> ECCC Press Release, International Co-Prosecutor files Supplementary Submission in Case 003, 4 November 2014.

18. There are valid concerns in including victims in the investigation. Victims do not speak with one voice. In the early stages of an investigation, especially in volatile situations, ascertaining who the victims and their legitimate representatives are can be fraught with competing claims and opinions. Certain victim groups may be politically co-opted to push the agenda of those responsible for violence by shifting the blame on others. Allowing such parties, whether victims or not, to exert undue pressure and influence or to frame the OTP's selection of cases and charges would clearly undermine the independence and impartiality of the Office. Instead we suggest dealing with such interests through victim legal representatives before the Court, enabling procedural protections for victims and some assessment of their background. In addition, care needs to be taken to ensure a representative sample of victims are able to participate in the investigation, not just urban, educated males who have better access to civil society or the internet to present their views or certain ethnic groups.<sup>43</sup> The Court in such instances has requested the Registry to conduct further research into the views of vulnerable groups in the situation of Côte d'Ivoire.<sup>44</sup> This represents good practice that the OTP should continue to engage in to ensure a plurality of victims' voices and to avoid entrenching dominant voices that may sit at the root of the violence or exclude certain actors or crimes. Moreover, allowing for victim participation and input into the OTP's decision making on case and charge selection and prioritisation does not mean that victims are able to dictate the outcome, but rather enables their voices to be heard in a more legal verified way.<sup>45</sup> The Registry has experience in Georgia stating the

*advantage of the pre-established relationships of trust and lines of communication found in the Georgian context between victims and those legitimately representing them so that: Victims would understand the limited nature of the exercise and would not confuse the Article 15 process with applying to participate in proceedings or requesting reparations; In many instances, it would not be necessary to ask victims to recount what happened because their experiences would already be known by their representatives; The representations would be the product of consultations with the victims; The representations could be completed within the 30-day deadline.*<sup>46</sup>

19. We recognise that despite early recognition of victim participation in the investigation by pre-trial chambers,<sup>47</sup> the Appeals Chamber has affirmed that the investigation is the exclusive domain of

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<sup>43</sup> C. Chung, Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise? *Northwestern Journal of International Human Rights* 6(3) (Spring 2008) 459–545, p513.

<sup>44</sup> *Situation in Republic of Côte d'Ivoire*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11-14, para.211

<sup>45</sup> J.A. Wemmers, *Victims in the Criminal Justice System* (Amsterdam: Kugler, 1996) 146–147.

<sup>46</sup> *Situation in Georgia*, Report on the Victims' Representations Received Pursuant to Article 15(3) of the Rome Statute, ICC-01/15-11, 4 December 2015, para.8.

<sup>47</sup> *Situation in the Democratic Republic of the Congo*, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101, 17 January 2006; and *Situation in Uganda*, Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06) ICC-02/04-101, 10 August 2007.

the Prosecutor.<sup>48</sup> This effectively leaves victims' role in the investigations at the ICC as informative rather than participative, to the detriment of oversight and transparency in the investigation. However this sits in contrast with victim participation and representations in investigations commenced *priorio motu* by the OTP.<sup>49</sup> Thus there is a two tiered system already in operation between *priorio motu* investigations and those state and UN Security Council referrals, where with the former victims can make representations in a situation investigation, without need to demonstrate personal interest as required under Article 68(3), whereas with the latter referrals victims have no entitled input.<sup>50</sup> Under Article 15(3) Pre-Trial Chamber III has recognised the 'importance of engaging victims as early as possible in the process and of ensuring they are able to make appropriate representations'.<sup>51</sup> Victims' representations have been helpful for the Court in determining an authorisation of an investigation and can substantiate or corroborate the Prosecutor's submissions.<sup>52</sup> However, in such instances the judges have noted the ambiguity in victims' representations, highlighting the need for legal representation to more effectively communicate their interests into legal terminology, such as contextual elements of the crime.<sup>53</sup> Moreover, some victims have expressed views and concerns that the ICC should not commence an investigation in countries such as Kenya.<sup>54</sup> Thus victims' representations in investigations can be helpful in getting a fuller picture of the crimes, the domestic processes and the OTP investigation. In this way, their views are not determinative, but help the OTP and judges to make a better informed decision when authorising investigations or confirming charges.

20. While we believe that legal representation of victims is one of the most effective ways for victims to navigate legal procedures within the Court and to voice their concerns, there are other ways for the OTP to engage victims. We have mentioned consultation above in decisions on the interests of

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<sup>48</sup> *Situation in the Democratic Republic of the Congo*, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, 19 December 2008; and *Situation in the Republic of Kenya*, Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, ICC-01/09-24, 3 November 2010.

<sup>49</sup> Article 15(3).

<sup>50</sup> W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, OUP 2010, p323. This is because of the differing nature of *priorio motu* investigations and greater oversight from the pre-trial chambers.

<sup>51</sup> *Situation in Côte d'Ivoire*, Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute, ICC-02/11-6, 6 July 2011, para.8.

<sup>52</sup> *Situation in Côte d'Ivoire*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11-1; and *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, 31 March 2010, para.196.

<sup>53</sup> *Situation in Côte d'Ivoire*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11-14, 3 October 2011, para.19-20.

<sup>54</sup> *Situation in the Republic of Kenya*, VPRS Report on Victims' Representations in Situation in the Republic of Kenya, ICC-01/09-17-Cor-Red, 29 March 2010, para.84-92.

justice and admissibility. However, an additional avenue could be allowing victims to request a review of a decision not to investigate or prosecute.

### **Right to review decisions not to prosecute or investigate**

21. A final option would be to allow victims a right to review decisions not to prosecute. The European Union has passed Directive 2012/29/EU on victims' rights, including a right to review decision not prosecution, so as to ensure greater transparency in prosecutorial decision making by allowing them to be impartially examined by an independent party.<sup>55</sup> In light of this Directive, the English Court of Appeal held that it would be 'disproportionate' for a public authority such as the Crown Prosecution Service 'not to have a system of review without recourse to court proceedings.'<sup>56</sup> Moreover, given that 'a decision not to prosecute is in reality a final decision for a victim, there must be a right to seek a review of such a decision'.<sup>57</sup> As such, in decisions not to prosecute a victim can request a review of it by another independent prosecutor.<sup>58</sup> More recently the English Court of Appeal has held that in reaching such decisions not to prosecute, consultations should be carried out with victims to make an 'informed decision'.<sup>59</sup> The Northern Irish courts have consistently stated that such reviews must be prompt, such as in cases where a number of years have passed since a murder.<sup>60</sup>
22. The Rome Statute permits a Pre-Trial Chamber to review decisions not to investigate or prosecute, but victims have no standing to make such a motion.<sup>61</sup> The Rules of Procedure and Evidence only oblige the OTP to inform victims when deciding not to initiate an investigation or prosecution under Article 53.<sup>62</sup> The OTP could allow victims to request a review through its own office, or judges could read into Rules 107 and 109 for victims to make submissions, but this would probably require amendments by the Assembly of State Parties.
23. Requests for victims to review the decisions not to investigate or prosecute can offer greater transparency, and thereby legitimacy, of the OTP selection of charges. In addition to allowing for the provision of information to the victims and the public more generally, legitimacy would be enhanced by ensuring that the decision making process would be subject to a review by an

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<sup>55</sup> Article 11, EU Directive 2012/29/EU Establishing minimum standards on the rights, support and protection of victims of crime, 25 October 2012.

<sup>56</sup> *R v Killick* [2011] EWCA Crim 1609 at 48.

<sup>57</sup> *Ibid.* at 48.

<sup>58</sup> *Ibid.* at 51.

<sup>59</sup> *R v Quillan and others* [2015] EWCA Crim 538 at 34. See also Article 6(1)(a), EU Directive 2012/29/EU.

<sup>60</sup> *Re Marie Louise Thompson* [2004] NIQB 62; *Re Julie Doherty* [2004] NIQB 78; and *Re McCabe* [2010] NIQB 58.

<sup>61</sup> Article 53(3), for state and UNSC referrals.

<sup>62</sup> Rule 92(2), ICC Rules of Procedure and Evidence.

impartial prosecutor. However, such a review would constitute a last resort and a post facto decision making process, providing a narrow avenue for victims in comparison to being included in consultations and being allowed to inform the decision making processes in an investigation.

## **Recommendations**

24. Drawing from the forgoing discussion we recommend the OTP takes into consideration the following recommendations:

- i. The interests of victims should be carefully spelt out in terms of interest of justice decisions under Articles 53(1)(c) and 53(2)(c). In such situations identifiable victims should be consulted, or engaged with through their legal representatives, so as to allow them to inform the Prosecutor's decision-making process, and to ensure that they are informed of the reasons for an OTP decision not to continue an investigation or prosecution.
- ii. In terms of admissibility, greater consideration should be given to the extent of domestic provisions on participation and protection when determining the effectiveness and transparency of domestic investigations and prosecutions of international crimes.
- iii. Victim participation in the investigation should be more actively encouraged to allow for more transparent and legitimate process and decision making at this key juncture.
- iv. The OTP should consider the development of a coherent strategy through which to balance the occasionally competing requirements that indictments be representative of the nature of harms perpetrated with the need to ensure expedient delivery of justice.
- v. The Court should develop provisions for a right to review decisions not to investigate or prosecute. Without changing the Rules of Procedure and Evidence, a right to review decisions not to investigate or prosecute would have to be facilitated by the OTP.